Supreme Court, U.S.
FILED
01 263 JUN 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

DYNAQUEST CORP., d/b/a A.C.L., MITCH KLASS and the Estate of M.T. Klass,

Petitioners,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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67 pp

QUESTION PRESENTED FOR REVIEW

Is the structure of the United States Postal Service, which allows Associate Judicial Officers to exercise executive authority, in violation of the Appointments Clause of the United States Constitution because Associate Judicial Officers are not appointed by the President, a Court of Law or the Head of a Department.

CORPORATE DISCLOSURE STATEMENT

The parties to the appeal before the D.C. Court of Appeals were Dynaquest Corporation., d/b/a A.C.L. (Association of Certified Liquidators), Mitch Klass and the Estate of M.T. Klass as Appellants. The Appellee below was the United States Postal Service.

Dynaquest Corp. is an Ohio for-profit corporation, with principle offices in Franklin County, Ohio. Dynaquest Corp. has no parent companies, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

-The Association of Certified Liquidators and A.C.L. are trade names used by Dynaquest Corp. The Association of Certified Liquidators and A.C.L. have no parent companies, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dynaquest Corp., d/b/a A.C.L., Mitch Klass and the Estate of M.T. Klass (Dynaquest) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated March 13, 2001, is reported at 242 F.3d 1070 (App. 1-16). The opinion of the District Court, dated August 3, 1999, is unreported (App. 17-24). The decision of the United States Postal Service Associate Judicial Officer, dated December 30, 1997, is unreported (App. 25-32).

JURISDICTION

On March 13, 2001, the United States Court of Appeals for the District of Columbia Circuit denied Petitioner's request for relief. Petitioner's request for en banc review was denied on May 17, 2001. Petitioner now timely files this petition within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. Art. II, Sec. 2, Cl. 2 – Treaty Making Power; Appointing Power

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

39 U.S.C. § 3005 – Text set forth in the Appendix at App. 35-38.

39 C.F.R. § 952.29 – Text set forth in Appendix at App. 39.

STATEMENT OF THE CASE

On June 19, 1996, Dynaquest Corp., d/b/a A.C.L., M.T. Klass and Mitch Klass (Dynaquest) filed an action with the United States Postal Service Associate Judicial Officer (AJO), captioned "Motion for Relief from Mail Stop Order, Application to Revoke Mail Stop Order; and for an Order Directing the Release of Escrowed Funds to Applicants and a Request for a Hearing." The Motion was filed pursuant to 39 C.F.R. § 952.29, which permits a party

against whom a mail stop order has been issued to file an application for modification or revocation of that order, and Federal Rule of Civil Procedure 60(b), which permits a party to seek relief from an order or judgment.

The Mail Stop Order from which Dynaquest requested relief was originally issued on December 28, 1990, in conjunction with a Postal Service Administrative Proceeding brought before a Postal Service Associate Judicial Officer against Dynaquest, pursuant to 39 U.S.C. § 3005, and captioned *In the Matter of Complaint Against A.C.L., et al.*, P.S. Docket No. 36/90. The Administrative Proceeding related to the Postal Service's claim that an advertising brochure used by Dynaquest contained eleven false representations. During the summer of 1990, the AJO conducted a full trial-type hearing in the § 3005 proceeding in Washington, D.C. Following the hearing, the AJO concluded that Dynaquest's advertising brochure contained four false representations. (Three of the eleven allegations of false representation set forth in the Postal Service Complaint were ultimately upheld on appeal). Dynaquest was ordered to cease and desist from making those representations.

Dynaquest's Motion for Relief from Mail Stop Order was denied by the AJO (App. 25) and Dynaquest sought review of the AJO's decision and further relief in the U.S. District Court for the District of Columbia, where it filed a Complaint for Declaratory Judgment and Injunctive Relief. The Postal Service filed a Motion to Dismiss which was granted by Order, dated August 3, 1999. (Opinion at App. 17, Order at App. 24) On appeal to the United States Court of Appeals for the District of Columbia Circuit, Dynaquest raised the issue of whether the decisions of

the AJO were invalid because they were issued pursuant to a delegation of executive power that violates the appointments clause. On March 13, 2001, the United States Court of Appeals for the District of Columbia affirmed the District Court's ruling. *Dynaquest v. U.S. Postal Service*, 242 F.3d 1070 (D.C. Cir. 2001). (App. 1) A request for rehearing en banc was denied on May 17, 2001. (App. 33)

REASONS FOR GRANTING THE WRIT

I. The Decisions and Orders Issued by the Associate Judicial Officers in *In the Matter of the Complaint Against A.C.L., et al.*, P. S. Docket No. 36/90 Are Invalid Because They Were Issued in Violation of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and Principles of Separation of Powers.

A. Introduction

The Appointments Clause of Article II provides that principal "Officers of the United States" must be appointed by the President "with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. *See also Edmond v. United States*, 520 U.S. 651 (1997). "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

In *Buckley v. Valeo*, 424 U.S. 1, 125 (1976), this Court held the Appointments Clause is not simply a matter of etiquette or protocol but one of the significant structural safeguards of the constitutional scheme. *United States v.*

Lazenby, 520 U.S. 651, 659 (1997). "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.' " *Ryder v. United States*, 515 U.S. 177, 182 (1995) *citing Freytag v. Commissioner*, 501 U.S. 868, 878 (1991). "The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint." *Freytag*, 501 U.S. at 880.

The decisions and orders issued by the Associate Judicial Officers (AJO) in *In the Matter of the Complaint Against A.C.L., et al.*, P. S. Docket No. 36/90 are invalid because they were issued pursuant to a delegation of executive power that violates the Appointments Clause of U.S. Const. Article II, § 2, cl. 2, as well as principles of separation of powers. This is true for at least two reasons. First, the AJO is an "inferior Officer" within the meaning of Article II, whose appointment by the Postmaster General (PG) is improper because the Postmaster General is not "the Head of a Department" possessing constitutional authority to make such an appointment. Second, even if the AJO is not an "inferior Officer" within the meaning of Article II, his exercise of executive authority was improper because the Postmaster General and Deputy Postmaster General are themselves appointed in an unconstitutional manner, breaking the requisite chain of executive authority between the AJO and the President.

This Court should accept jurisdiction because it has never considered whether one of the most important United States Governmental Offices, the Postal Service, is

being administered in a way that violates the Appointments Clause. In addition, this Court should, at the very least, reverse the decision of the D.C. Circuit Court of Appeals because its decision is in direct contravention to precedent from this Court and the D.C. Circuit's own ruling in *Landry v. F.D.I.C.*, 204 F.3d 1125 (D.C. Cir. 2000).

B. The AJOs who issued decisions in this case are "inferior Officers" because they are authorized to render final agency decisions.

The AJO who ruled in this case that Dynaquest had engaged in false representations and the AJO who denied Dynaquest's Motion for Relief plainly are "inferior Officers" of the United States, appointed under authority delegated by the Postmaster General, 39 C.F.R. § 952.1, and not by the President, a Court of Law, or the Head of a Department, contrary to the express language of the Appointments Clause.

The Appointments Clause decisions of this Court make it clear that an AJO of the Postal Service is an "inferior Officer" as that term is used in Article II. This Court has consistently held that federal personnel performing adjudicatory functions are "Officers of the United States," within the meaning of the Appointments Clause. *Edmond v. United States*, 520 U.S. 651 (1997) (judges of the Coast Guard Court of Criminal Appeals); *Ryder v. United States*, 515 U.S. 177 (1995) (judges of the Coast Guard Court of Military Review); *Weiss v. United States*, 510 U.S. 163 (1994) (military judges); *Freytag v. Commissioner*, 501 U.S. 868 (1991) (special tax court judges); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (United States Commissioners).

The Postal Service AJOs in the instant case, like the special tax court judges ("STJs") found to be "inferior Officers" in *Freytag*, 501 U.S. at 881-82, are authorized to conduct trials, take testimony, and rule on evidence. 39 C.F.R. § 952.17. Even more significantly, the AJOs, like the STJs in *Freytag*, render final agency decisions pursuant to adjudicatory authority delegated by the Judicial Officer. *E.g.*, 39 C.F.R. § 963.20 (Associate Judicial Officer or Judicial Officer can render final agency decision); § 965.4 ("Judicial Officer" includes "Associate Judicial Officer" upon delegation thereto, either of whom can issue "a final decision"); *see generally*, Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 Admin. L. Rev. 251, 253 (1998) ("The [Postal Service's] JO is not an ALJ. . . . The JO's decisions constitute final agency action; there is no further review within the USPS.").

The D.C. Circuit in this case held contrary to its previous decision in *Landry*. In *Landry*, the D.C. Circuit deemed final decision-making power crucial in determining that an official is an inferior officer for purposes of the Appointments Clause: "we believe that the STJs' power of final decision in certain cases was critical to the [*Freytag*] Court's decision." 204 F.3d at 1134. Because the ALJs in *Landry* had no power to make final decisions, but could only make recommendations to the FDIC, the court concluded that they were not inferior officers. *Id.* Conversely, because the Postal Service's AJO *possesses* this critical power to render final decisions, he is an inferior officer subject to the requirements of the Appointments Clause.

However, the AJO's appointment does not satisfy the Constitution's precise mandate that the appointment of

inferior officers be vested by Congress "in the President alone, in the Courts of Law, or in the Heads of Departments." The AJO acts under authority of the Judicial Officer,[1] who is "appointed by, and serve[s] at the pleasure of, the Postmaster General." 39 U.S.C. § 204. As an "inferior Officer," the AJO can be appointed by the PG only if the PG is the Head of a Department within the meaning of Article II (since he is obviously not the President or a Court of Law). *See* U.S. Const. art. II, § 2, cl. 2. Plainly, the PG is not the "Head of a Department." The Postal Service is not a "Department" for Appointments Clause purposes, and even if it were, the PG is not the "Head" of it.

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[1] It is not entirely clear how the Associate Judicial Officer is selected. The United States Code makes no mention of an "Associate Judicial Officer." Several sections of the Code of Federal Regulations refer to the Associate Judicial Officer, but none of these specify the manner in which the AJO is selected. *See* 39 C.F.R. §§ 951.6; 955.1; 963.4; 963.20; 965.4; 965.12; 966.3 (1999). Thus, Dynaquest contends that the AJO's appointment violates the Constitution because he is an inferior officer whose appointment Congress has not "by Law" vested in *anyone*, let alone the Head of a Department, contrary to Article II, § 2, cl. 2. However, even if the AJO's appointment is somehow pursuant to law, it can only have been made by the Judicial Officer of the Postal Service (who even the Postal Service would not contend is the "Head of a Department"), or by the Postmaster General. For the reasons that are set forth below, the Postmaster General is not the Head of a Department capable of appointing inferior officers of the United States.

C. The Postal Service is not a "Department" within the meaning of the Appointments Clause.

The Postal Service does not constitute a "Department" under the Appointments Clause simply because it is part of the Executive branch. In *Freytag*, five justices rejected the "assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power." *Freytag*, 501 U.S. at 885. In order to be a "Department" for purposes of the Appointments Clause, the Postal Service would have to be an "executive division like the Cabinet-level departments." *Id.* at 886.

However, the Postal Service ceased to be a Cabinet-level department in 1970 when Congress did away with the "Post Office Department," created the U.S. Postal Service, and removed the PG from the President's Cabinet. *Carlin v. McKean*, 823 F.2d 620, 621 (D.C. Cir. 1987); *see also* 39 U.S.C. §§ 101 *et seq.* (reorganizing the Post Office Department into the U.S. Postal Service).

Moreover, there is no indication that the Political Branches consider the Postal Service to be an "executive Department." When the Political Branches intend to create a department, they do so by naming it a department. *Freytag*, 501 U.S. at 887 (noting that "Congress . . . enacted legislation in 1969 with the express purpose of 'making the Tax Court an Article I court rather than an executive agency' "). Section 101 of Title 5, U.S.C., which statutorily defines the "Executive departments," does not mention the Postal Service. *See also United States v. Germaine*, 99 U.S. 508, 511 (1879) ("The association of the

words 'heads of departments' with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of departments."). Instead, 39 U.S.C. § 201 creates the Postal service as *"an independent establishment* of the executive branch," not a department. Thus, no one in the Postal Service could be vested with power to appoint inferior Officers of the United States.

D. Even if the Postal Service is a "Department" within the meaning of the Appointments Clause, the Postmaster General, who is hired by and serves at the pleasure of the Governors of the Postal Service, is not its "Head."

Even if the Postal Service constitutes a "Department" for purposes of the Appointments Clause, the PG is not its "Head" owing to the peculiar organization of the Postal Service. *See Silver v. United States Postal Service*, 951 F.2d 1033, 1039 (9th Cir. 1991) (concluding that PG is not the head of Postal Service, though a divided panel held that statutory scheme did not violate Appointments Clause). The PG, though statutorily designated the "chief executive officer of the postal service," 39 U.S.C. § 203, is neither appointed by the President nor confirmed by the Senate. Instead, he and the Deputy Postmaster General (DPG) serve at the pleasure of nine Governors of the Postal Service. 39 U.S.C. § 202. The Governors are themselves appointed by the President with the advice and consent of the Senate, and they in turn appoint the PG. *Id.* It is the Governors who also fix the PG's pay, term of

service, and have complete authority to remove the PG. *Id.*

Thus the PG, like an executive director who carries out the policies of a governing board, cannot be considered the "Head" of the Postal Service. *Silver v. United States Postal Service*, 951 F.2d 1033, 1038-39 (9th Cir. 1991) ("In light of the Governors removal authority, it is impossible to conclude that the PG is the head of the department.") Respondent conceded this point in their brief below. Consequently, the PG's appointment of the AJO in the instant case violated the express requirements of the Appointments Clause.

Invalidation of proceedings conducted by individuals who lack constitutional authority is the only effective judicial means of deterring violations of the Appointments Clause in light of "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Freytag*, 501 U.S. at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Harlan, J.)). The availability of this meaningful remedy will ensure that litigants raise constitutional challenges, and the resulting judicial check on the Political Branches will decrease the likelihood that the constitutional requirements for the appointment of officers of the United States will be disregarded. *See Ryder v. United States*, 515 U.S. 177, 182 (1995) (one who challenges "the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred").

E. Even if the AJOs are not "inferior Officers," they are improperly delegated with executive authority because the Postal Service Board of Governors is comprised of members whose own appointments violate the Constitution, and thus neither the Board nor the AJOs can properly exercise executive authority.

Assuming for purposes of argument that the AJO was a mere "employee" and not an "inferior Officer" who must be appointed by a Head of a Department, the AJO improperly exercised executive authority because the statutory scheme governing the Postal Service is constitutionally flawed. The Postmaster General, who is the "chief executive officer" of the Postal Service and responsible for its daily operations, *see* 39 U.S.C. § 203, is not appointed by the President with the advice and consent of the Senate. If he is a principal Officer of the United States, "his appointment manifestly violates the Appointments Clause." *Silver v. United States Postal Service*, 951 F.2d 1033, 1043 (9th Cir. 1991) (O'Scannlain, J., dissenting).

However, even if the PG is himself merely an "inferior Officer," his appointment is improper. The Postal Service is managed by an eleven member Board comprised of nine Governors appointed in a manner that is consistent with the Appointments Clause, plus the PG and the Deputy Postmaster General (the "DPG") who are hired by the nine Governors. 39 U.S.C. § 202. Yet by law, "exercise of the power of the Postal Service" is directed only to the full eleven-member Board. 39 U.S.C. § 202(a). Moreover, it is the Board (and not the nine Governors) which directs and controls the expenditures of the Postal

Service, and reviews the Service's practices and policies. 39 U.S.C. § 205(a). The full Board alone can delegate authority to the PG. 39 U.S.C. § 402. Although only the Governors vote on rate increases and new classes of mail, 39 U.S.C. § 3621, all other powers of the Postal Service are wielded by the entire Board.

Under this statutory scheme, the full Board governs and controls the Postal Service and is the Head of the "Department" (assuming for purposes of argument that the Postal Service is one). Yet a subset of the Board (the nine Governors) control appointment of the PG and the DPG. The PG then appoints the JO and possibly the AJO's further lengthening the chain from a proper appointment under the Appointments Clause. This contravenes Article II which lists only three options for appointing inferior Officers: the President, the Courts of Law, and the Heads of Departments – not subsets thereof.

In *Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991), two judges on the panel concluded that this system did not violate the Appointments Clause because the Head of the Postal Service was found to be the nine Governors who make up a part of the Board. However, their conclusion utterly fails to take into account 39 U.S.C. § 202(a) which expressly states that the power of the Postal Service "shall be directed *by a Board of Governors composed of 11 members.*" (Emphasis supplied). Thus, Congress has made it clear that the entire Board "heads" the Postal Service; and the Board must be composed of 11 properly appointed members.

Consequently, the view advanced by Judge O'Scannlain, in dissent, is more faithful to the actual statutory structure of the Postal Service:

> Because the Board has members whose appointment violates the Appointments Clause, in my view, the Board cannot exercise executive authority. The fact that the PG and the DPG are just two of the eleven members of the Board does not eliminate the constitutional infirmity. As a practical matter, the actions of the Board may be dependent on the PG and the DPG, as when they are needed to form a quorum, or where they cast the deciding votes. More fundamentally, the command of the Appointments Clause is not mere "etiquette or protocol," and to allow powerful boards or commissions to be composed, even in part, by members appointed in an unconstitutional manner would vitiate the Appointments Clause.
>
> This constitutional infirmity of the Board interrupts the chain of enforcement authority from the President to the Judicial Officer and ALJ. Because of its unconstitutional composition, the Board is bereft of any executive enforcement authority to delegate to the PG, let alone to the Judicial Officer and ALJ.

Id. at 1045-46 (citations omitted).

Moreover, the examples given by Judge O'Scannlain of important Board actions being dependent on the PG and the DPG are hardly far fetched. In one particularly fierce dispute over postal ratemaking between the Postal Service and the President, the PG and DPG played a crucial role in frustrating the will of President Bush. *See* Neal Devins, *Tempest in an Envelope: Reflections on the Bush*

Whitehouse's Failed Takeover of the U.S. Postal Service, 41 UCLA L. Rev. 1035, 1044-47 (1994). Such standoffs between the President and the Postal Service may be attributable to "the failure of the legislative branch to think through its parcelling out of governmental authority [when it restructured the Postal Service]." *Id.* at 1036. In Professor Devins' view, this is because "when Congress removed the Postmaster General from the President's Cabinet in 1970, Congress paid insufficient attention to structure-of-government concerns." *Id.*; *see also id.* at 1044-45 ("day-to-day Postal Service decision-making . . . is devoid of meaningful presidential influence" owing to fact that PG and DPG are not appointed by the President, but by the Governors). It is precisely this sort of encroachment on presidential authority by Congress that the Appointments Clause was designed to prevent.[2] *See Edmond v. United States*, 520 U.S. 651, 659 (1997).

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[2] The inconsistency of the Postal Service scheme with the Appointments Clause would be obvious if it were imported into a more familiar system such as the federal judiciary. Imagine that instead of being nominated by the President and confirmed by the Senate, the Chief Justice of this Court were hired by and served at the pleasure of the other justices (who were themselves confirmed by the Senate). The unconstitutionality of such an arrangement is obvious.

F. The refusal of the D.C. Court of Appeals to decide the Appointments Clause issue because Petitioner could not prove he would have achieved a favorable result had the AJOs been constitutionally appointed is contrary to established precedent from this Court and the D.C. Circuit itself.

The Court of Appeals below held that it need not consider Dynaquest's Appointments Clause challenge because "resolution of the Appointments Clause issue in Dynaquest's favor would bring the company no relief." *Dynaquest*, 242 F.3d at 1076. The Court of Appeals reasoning is contrary to established decisions of this Court, its own Circuit, and other Courts that have reviewed this issue.

In *Freytag*, this Court held that judicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated. *Freytag*, 501 U.S. at 878. In discussing structural error, the *Landry* Court noted the *Freytag* reasoning and expounded upon it by holding that: "Issues of separation of powers (including Appointments Clause matters, *Freytag*, 501 U.S. at 878), seem most fit to the doctrine; it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design – structure – played a causal role in his loss." *Landry*, 204 F.3d at 1131. *See also Andrade v. Lauer*, 729 F.2d 1475, 1495-96 (D.C. Cir. 1984) (holding that plaintiffs raising Appointments Clause challenge need not show that they would not have suffered injury if officials had been properly appointed); *Freytag*, 501 U.S. at 879 (although petitioners had not raised in the trial court the argument that tax court judges were not

appointed in conformity with Article II, review was appropriate to protect interests of "the entire Republic"), *see also Weiss v. United States*, 510 U.S. 163, 188-89 (1994); *Buckley v. Valeo*, 424 U.S. 1, 124-25 (1976), (noting the importance of the Appointments Clause to maintaining separation of powers); *Silver v. United States Postal Service*, 951 F.2d 1033, n. 2 (9th Cir. 1991) (holding that after *Freytag*, invalidity of appointment of government official may properly be challenged in a collateral attack because of the importance of the issue).

A recent district court case described the common principle running through the D.C. Circuit's Appointments Clause decisions, prior to *Dynaquest:*

A common thread runs through [the D.C. Circuit's Appointments Clause cases]:

> An Appointments Clause challenge runs deeper than any immediate adverse governmental action a plaintiff may seek to avoid; it also entails the plaintiff's subjection to an exercise of power by an unconstitutionally appointed officer.

Pennsylvania Department of Welfare v. United States, 124 F.Supp.2d 917, 922 (W.D. Pa. 2000). Relying primarily on the "better reasoned" *Landry* and *Andrade* line of cases, the Pennsylvania District Court held that a party subjected to the adverse actions of an unconstitutionally appointed officer need not show that a constitutionally proper appointment would have "prevented a specific adverse decision." *Id.* at 923.

The decision of the *Dynaquest* panel is totally at odds with this Court's decisions and the Circuit's own decision issued just one year earlier. The question whether the Postal Service's "unique" approach can be squared with

the requirements of the Appointments Clause is one of first impression in this Court, and its resolution is of great importance. As the highest Court in the land, this Court must operate as a check and balance on the operations of the other branches of government, particularly when they exercise power contrary to the Constitution of the United States. The Postal Service's scheme of appointments is unconstitutional and must be invalidated by this Court if the Constitution's structural integrity is to be preserved.

CONCLUSION

This Court should grant certiorari to consider, for the first time, the constitutionality of the United States Postal Service's scheme of appointing judicial officers. This Court has consistently upheld the importance of the Appointments Clause. An agency as vast and important as the Postal Service should not be operating contrary to the United States Constitution; however, it is clear that its appointments are not in accord with the Appointments Clause as well as principles of separation of powers. This Court should consider this matter of first impression and great import by granting certiorari.

Respectfully submitted,

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Counsel for Petitioners

No. _____

In The

Supreme Court of the United States

DYNAQUEST CORP., d/b/a A.C.L., MITCH KLASS
and the Estate of M.T. Klass,

Petitioners,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

APPENDIX

United States Court of Appeals,
District of Columbia Circuit.

DYNAQUEST CORP., d/b/a A.C.L., et al.,

Appellants,

v.

UNITED STATES POSTAL SERVICE, Appellee.

No. 99-5326.

Argued Sept. 12, 2000.
Decided March 13, 2001.
Rehearing En Banc Denied May 17, 2001.

Appeal from the United States District Court for the District of Columbia (No. 98cv00564).

Max Kravitz argued the cause for appellants. With him on the briefs was David B. Smith.

David T. Smorodin, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Wilma A. Lewis, U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney.

Before: HENDERSON, RANDOLPH and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge GARLAND.

GARLAND, Circuit Judge:

Dynaquest Corp. seeks the release of funds held in escrow in connection with administrative proceedings brought against the company by the **United States Postal Service**. Various incarnations of **Dynaquest's** claims have been heard by numerous courts – including this court and

the United States Court of Appeals for the Sixth Circuit – over a period spanning ten years. We conclude that **Dynaquest's** present efforts to obtain the funds are barred by the doctrine of res judicata and affirm the district court's dismissal of **Dynaquest's** complaint.

I

Dynaquest, an Ohio corporation, buys and sells discontinued lines, unwanted special order items, liquidated goods, and other "distressed merchandise." It also mails unsolicited advertisements for a training program, which includes a manual entitled *Liquidate Your Way to a Fortune,* instructing purchasers in the business of asset location and liquidation.

On June 7, 1990, the Postal Service filed an administrative complaint against the company before a Postal Service Administrative Judicial Officer (AJO) in Washington, D.C. The complaint charged Dynaquest with "conducting a scheme for obtaining money or property through the mail by means of false representations," in violation of 39 U.S.C. § 3005. Postal Service Compl. at 1 (J.A. at 54). The complaint alleged that the company's mailings contained eleven false representations.[1] Eight

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[1] As discussed below, three of the eleven allegations were ultimately upheld on appeal. *DynaQuest Corp. v. United States Postal Serv.,* 12 F.3d 1144 (D.C.Cir.1994). Those allegations charged that Dynaquest falsely represented it would: (1) "assist purchasers of [its] program to earn . . . thousands of dollars without the need . . . to make any additional payments to [Dynaquest]," (2) "pay a hundred dollars ($100.00) in cash to any addressee who purchases [the] program," and (3) "provide

days later, the Postal Service filed a separate action in the United States District Court for the Southern District of Ohio, pursuant to 39 U.S.C. § 3007, seeking a temporary restraining order and preliminary injunction directing the detention of Dynaquest's mail pending the resolution of the § 3005 administrative proceedings. Section 3007 authorizes the district court in the district in which a defendant receives its mail to enter such interim relief. 39 U.S.C. § 3007(a).

The Ohio district court issued a temporary restraining order under § 3007, directing the Postal Service to hold all checks and accompanying information mailed in response to the Dynaquest advertisements, and scheduled a hearing on the Postal Service's motion for a preliminary injunction for June 21, 1990. Prior to commencement of the hearing, the parties entered into – and the court approved – an "Agreed Order." The Agreed Order required that all checks and applications be returned to prospective customers, along with a "bounce-back" letter "clarifying" Dynaquest's offer and asking whether the customers still wished to purchase Dynaquest's services. Agreed Order at 1-2 (J.A. at 51-52). The Order further directed the Postal Service to forward any checks sent by customers who had received bounce-back letters to a co-administered escrow account. Finally, the parties stipulated that the Agreed Order would remain in effect until "the final disposition of the administrative complaint," *id.* at 1 (J.A. at 51), which would "be deemed

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purchasers of the program with comprehensive training in the merchandise liquidation field." Postal Service Compl. ¶¶ 10(d), (g), (i) (J.A. at 56-57).

to occur after the conclusion of any appeal by [Dynaquest] from the . . . decision of the Postal Service Judicial Officer," *id.* at 2-3 (J.A. at 52-53).

Following entry of the Agreed Order, the parties proceeded to litigate the § 3005 proceeding in Washington, D.C., and then returned to Ohio to litigate the § 3007 proceeding. In 1996, Dynaquest once again went to Washington to file the pleadings that led to the instant appeal. We describe each of these three courses of litigation below, in order to provide the background necessary to understand our disposition of this case.

A

During the summer of 1990, the AJO conducted a full trial-type hearing in the § 3005 proceeding in Washington, D.C. Following the hearing, the AJO concluded that Dynaquest had violated the statute by making four of the materially false representations alleged in the Postal Service's complaint. *In re A.C.L.*, P.S. Docket No. 36/90 (U.S. Postal Serv. Dec. 28, 1990). Dynaquest was ordered to cease and desist from making those representations.

On March 18, 1991, Dynaquest moved for reconsideration of the AJO's decision, challenging the false representation findings and requesting the release of the funds held in escrow. Resp't Mot. for Recons. (J.A. at 259). With respect to the latter request, Dynaquest argued that because the escrow funds were sent by customers who had received the bounce-back letters, any initial misrepresentations had been cured. Thus, Dynaquest argued, it would be unjust to deprive the company of those funds. *Id.* at 12-16 (J.A. at 270-74).

The AJO denied Dynaquest's motion in its entirety. *In re A.C.L.*, P.S. Docket No. 36/90 (U.S. Postal Serv. May 15, 1991). He rejected the company's challenges to the false representation findings, and dismissed the request for the release of funds on the ground that the escrow accounts had been established under the Agreed Order of the district court in Ohio. Only that court, the AJO held, had jurisdiction over the interpretation and enforcement of its own Order. *Id.* at 4.

Dynaquest sought review of the AJO's decisions in the United States District Court for the District of Columbia, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994). It sought a declaratory judgment that the false representation findings were not supported by substantial evidence and an injunction against enforcement of the AJO's order. Dynaquest did not, however, reassert its claim that the bounce-back letters had cured any alleged misrepresentations, nor did the company otherwise appeal the AJO's determination that he lacked jurisdiction over the escrow funds. On cross motions for summary judgment, the district court affirmed the AJO's findings regarding three of the four representations, vacated the fourth, and sustained the Postal Service's order. *Dynaquest Corp. v. United States Postal Serv.*, No. 91-1582 (D.D.C. Mar. 5, 1992). Dynaquest appealed to this court, contending that two of the three findings upheld by the district court were not supported by substantial evidence. We affirmed the district court's decision on January 18, 1994. *DynaQuest Corp. v. United States Postal Serv.*, 12 F.3d 1144 (D.C.Cir.1994). Dynaquest did not seek further review.

B

In early 1994, the parties filed cross motions for summary judgment in the still-pending § 3007 proceeding in the Southern District of Ohio, seeking to resolve the disposition of the escrow funds. On June 2, 1994, the district court granted judgment for the Postal Service and directed that the funds be returned to Dynaquest's customers. *United States Postal Serv. v. Klass*, No. C2-90-450, slip op. at 9, 11 (S.D. Ohio June 2, 1994). The court interpreted the language of the Agreed Order to require that, upon final disposition of the administrative complaint, the funds were to go to the party prevailing in the § 3005 proceeding in Washington. *Id.* at 9. This interpretation was confirmed, the court said, by statements of Dynaquest's counsel at a status conference held in the § 3007 proceeding in February 1992. *Id.* at 9-10. In light of this circuit's affirmance of the AJO's findings of misrepresentation, and Dynaquest's failure to seek further review, the Ohio district court concluded that final disposition of the § 3005 administrative complaint had occurred and that the Postal Service was the prevailing party. *Id.* at 8-9. The court rejected as irrelevant Dynaquest's claim that the bounce-back letters had cured the misrepresentations. Section 3007 did not give it authority to make such a determination, the court said. Whether customers were misled was a question for the § 3005 proceeding, and that proceeding was now closed. *Id.* at 9-10.

Dynaquest appealed the Ohio district court's refusal to award it the escrow funds to the United States Court of Appeals for the Sixth Circuit. The company made two principal points. First, it argued that the district court erred in not determining whether the bounce-back letters

cured the misrepresentations. The Sixth Circuit rejected this argument, holding that the district court was indeed without authority to decide, in a § 3007 proceeding, whether the bounce-back letters violated the false representations statute. That, the court said, could only have been decided in the § 3005 proceeding in Washington, and Dynaquest should have amended its administrative pleadings to raise the issue there. *United States Postal Serv. v. Klass*, 74 F.3d 1241 (6th Cir.1996) ("Section 3007 specifies that the district court issuing the injunction has no authority to 'determine any fact at issue in the statutory proceeding.' " (quoting 39 U.S.C. § 3007(a) (repealed 1999))).

Second, Dynaquest argued that the district court erred in construing the Agreed Order to require disposition of the escrow funds to the victor in the § 3005 proceeding. Moreover, the company insisted, the court further erred in interpreting its counsel's statements as confirming that view. Once again, the Sixth Circuit disagreed, this time on the merits:

> [F]orwarding the money to Dynaquest would violate the intent of the parties when they entered into the agreement. Statements from the injunction hearing indicate the parties' understanding that Dynaquest would not receive the funds unless it prevailed on all of the claims of misrepresentation. The record clearly demonstrates Dynaquest's expectation that it would not receive the escrowed funds unless it prevailed.

Id. (citation omitted). By the terms of the Agreed Order, the Sixth Circuit held, Dynaquest could not obtain the

escrow funds unless it defeated all of the allegations of misrepresentation. *Id.* Because Dynaquest had not, the court affirmed the award of the escrow funds to the Postal Service. *Id.* at *3.[2]

C

On June 19, 1996, Dynaquest returned to Washington to file a motion with the AJO seeking, inter alia, an order directing release of the escrow funds. Dynaquest argued that the Postal Service did not have authority under the AJO's original order to return remittances to those who had received bounce-back letters. Dynaquest Mot. at 16 (J.A. at 35). Dynaquest also argued that it had never received a hearing on the merits of its claim that it was entitled to the escrow funds because the bounce-back procedures had cured any misrepresentations in its initial solicitations. *Id.*

On December 30, 1997, the AJO denied Dynaquest's request. *In re A.C.L.*, P.S. Docket No. 36/90 (U.S. Postal Serv. Dec. 30, 1997). The AJO held that "the disposition of the escrowed funds is essentially a question of interpreting the provisions of the Agreed Order that was negotiated by the parties and issued by the United States District Court for the Southern District of Ohio." *Id.* at 5.

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[2] Although the Southern District of Ohio stated that the escrow funds should be returned to Dynaquest's customers, the Sixth Circuit described the district court's order as awarding the funds to the Postal Service. The Postal Service has indicated that once it gains possession of the funds, it intends to release them to the customers. Further action regarding release of the funds has been stayed, however, pending resolution of this appeal.

That court, the AJO said, had concluded that Dynaquest "had failed to prevail in the § 3005 proceedings, and that under the terms of the Agreed Order the funds held in escrow were to be returned to the consumers who had ordered [Dynaquest's] materials." *Id.* Moreover, the AJO stressed, the Sixth Circuit had affirmed the district court's order, concluding that Dynaquest was "precluded from receiving the escrowed funds by the terms of the Agreed Order that [it] entered into." *Id.* at 5-6. Dynaquest's current motion was, therefore, "in effect, a collateral attack on the judgments of those two courts and seeks to have the Judicial Officer overrule the courts and direct that the funds held in escrow be paid" to Dynaquest. *Id.* at 6. That, the AJO concluded, he did "not have the authority to do." *Id.*

On March 5, 1998, Dynaquest sought review of the AJO's decision in the United States District Court for the District of Columbia. On August 2, 1999, the district court found that Dynaquest's motion for release of the escrow funds was barred by the res judicata effect of the initial, 1990 proceeding before the AJO. "Dynaquest's claim that any false representations in its solicitations were cured by the bounce-back letters," the court said, "was within the purview of the [1990] administrative proceeding. Dynaquest's failure to litigate this issue constitutes a waiver of its right to raise it in subsequent proceedings." *Dynaquest Corp. v. United States Postal Serv.*, No. 98-0564, slip op. at 5-6 (D.D.C. Aug. 2, 1999) (citations omitted). On September 27, 1999, Dynaquest filed a notice of appeal.[3]

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[3] We note that 39 U.S.C. § 3007 was subsequently amended on December 12, 1999, effective 120 days later, to provide: "If

II

Although the course that led the parties to this court was a tortuous one, disposition of this appeal is not equally difficult. The United States District Court for the Southern District of Ohio concluded that, by the terms of the Agreed Order approved by that court, Dynaquest was not entitled to the escrow funds. The Sixth Circuit agreed, holding that "the intent of the parties when they entered into" the Agreed Order was that "Dynaquest would not receive the [escrow] funds unless it prevailed on all of the claims of misrepresentation." *Dynaquest*, 1996 WL 20504, at *2. Because Dynaquest had not prevailed on all of the misrepresentation claims, the Sixth Circuit affirmed the award of the funds to the Postal Service. *Id.* at *3. Dynaquest sought no further review.

The Sixth Circuit's ruling is a final decision on the merits. The AJO correctly concluded that he was bound by that decision under the doctrine of res judicata. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); *Commissioner v. Sunnen*, 333 U.S. 591, 601, 68 S.Ct. 715, 92 L.Ed. 898 (1948).[4] This court is

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any order is issued under [§ 3007(a)] and the proceedings under section 3005 are concluded with the issuance of an order under that section, any judicial review of the matter shall be in the district in which the order under [§ 3007(a)] was issued." 39 U.S.C. § 3007(b).

[4] We use "res judicata" in its generic sense to include the concepts of both issue preclusion (also known as "collateral

likewise so bound. Although Dynaquest argues, vehemently, that the Sixth Circuit misconstrued both the language of the Agreed Order and the statements of its counsel, those issues are foreclosed from our consideration. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong. . . . "). The place for Dynaquest to have raised those concerns was in a petition for rehearing en banc to the Sixth Circuit, or in a petition for certiorari to the United States Supreme Court. This circuit, however, has no authority to collaterally review the decisions of a sister circuit. *See id.* ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review. . . . " (citation omitted)); *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 354 (D.C.Cir.2000).

Dynaquest further contends that res judicata cannot bar its claim regarding the curative effect of the bounce-back letters, because neither the Sixth Circuit nor the Southern District of Ohio decided that claim on the merits. Rather, Dynaquest notes, those courts merely held themselves without authority to decide the claim, on the ground that only the AJO in the § 3005 proceeding had

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estoppel") and claim preclusion. Because the meaning and effect of the Agreed Order were litigated by the parties and decided by the court, issue preclusion is the specific concept at work here. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402, at 6-8 (1981).

such authority. *See* 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER § 4402, at 11 ("Dismissal of a suit for want of federal subject matter jurisdiction, for example, should not bar an action on the same claim in a court that does have subject matter jurisdiction. . . . "). Moreover, Dynaquest continues, both the Sixth Circuit and the district court in the present litigation erred in stating that the company had not raised the issue before the AJO. As Dynaquest correctly points out, it did raise the issue in its 1991 motion for reconsideration, where it was met by the AJO's ruling that he lacked jurisdiction to decide the question. *See In re A.C.L.*, P.S. Docket No. 36/90, slip op. at 4 (U.S. Postal Serv. May 15, 1991); Resp't Mot. for Recons. at 16 (J.A. at 274).

Unfortunately for Dynaquest, whatever the validity of its arguments about the merits of the bounce-back cure, or about our jurisdiction to resolve that issue, those arguments are now moot. Their only relevance in the present case is to the question of whether the escrow funds should be released to Dynaquest. But the Sixth Circuit has already construed the Agreed Order to bar release of the escrow to Dynaquest – irrespective of any bounce-back cure – because three of the company's initial representations were found to have been false. Accordingly, resolving the bounce-back question would have no impact on disposition of the escrow funds. And because a favorable judicial decision on the bounce-back question would not bring Dynaquest the redress it seeks, we are without authority to adjudicate the issue. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983) ("To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some

actual injury that can be redressed by a favorable judicial decision."); *see also Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *FDIC v. Kooyomjian*, 220 F.3d 10, 14-15 (1st Cir.2000).[5]

Finally, Dynaquest contends, for the first time on this appeal, that the decision of the AJO below is invalid because Postal Service AJOs are appointed in violation of the Appointments Clause of the U.S. Constitution. U.S. Const. art. II, § 2, cl. 2. Although we normally would not permit a litigant to present a legal theory that it failed to

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[5] Resolution of the bounce-back question is also barred by the doctrine of res judicata as a result of Dynaquest's failure to appeal the AJO's jurisdictional ruling in 1991. As Dynaquest notes, it raised the bounce-back issue in its 1991 motion for reconsideration before the AJO. In his decision on that motion, the AJO ruled both that Dynaquest's initial representations were false and that he lacked jurisdiction over the bounce-back issue. Although Dynaquest's appeal of the AJO's order challenged the former ruling, it did not challenge the AJO's conclusion that he was without jurisdiction to decide the bounce-back question. Accordingly, that issue is now res judicata between the parties. *See Allen*, 449 U.S. at 94, 101 S.Ct. 411 ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action." (emphasis added)); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C.Cir.1983) ("[T]he doctrine of *res judicata* applies to dismissal for lack of jurisdiction as well as for other grounds. . . . "); 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.3, at 250 (3d ed.1994) (noting that res judicata applies to administrative as well as judicial adjudications, and to questions of law as well as fact).

raise below, *see Grant v. United States Air Force*, 197 F.3d 539, 542 (D.C.Cir.1999), courts have discretion to consider Appointments Clause challenges raised for the first time on appeal, *see Freytag v. Commissioner*, 501 U.S. 868, 878-79, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991).[6] But as was true of the bounce-back issue, a victory on its Appointments Clause challenge would not advance Dynaquest's cause. In the decision presently on appeal, the AJO held nothing more than that he was without authority to grant Dynaquest's motion for release of the escrow funds. He based that holding on his conclusion that the Sixth Circuit's ruling – that the district court's Agreed Order precluded such release – bound him by the force of res judicata. As we have just held, the AJO's resolution of this legal question was correct. No AJO, regardless of the validity of his appointment, would have authority to decide the issue otherwise. Indeed, the same is true of

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[6] We may not, however, consider challenges to the validity of the AJO's 1990 and 1991 decisions, which were affirmed by this court in 1994 and are no longer open to attack. *Cf. Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 71 L.Ed. 1069 (1927) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause."); 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & Edward H. COOPER § 4428, at 282 ("[F]ederal court judgments are binding notwithstanding a simple lack of subject matter jurisdiction, without regard to whether the jurisdictional question was litigated."); *id.* at 282 n. 29 ("An assertion of jurisdiction by an administrative tribunal is likely to be treated in the same way as an assertion by a court if the decision has been subjected to judicial review." (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403, 60 S.Ct. 907, 84 L.Ed. 1263 (1940))).

this Article III court. Accordingly, resolution of the Appointments Clause issue in Dynaquest's favor would bring the company no relief and would amount to nothing more than an advisory opinion. Issuance of such an opinion is, of course, beyond our power under Article III. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987).[7]

IV

The Sixth Circuit interpreted the district court's Agreed Order as requiring that the escrow funds be awarded to the Postal Service. That holding is res judicata and may not be collaterally attacked in this court. Moreover, because that holding leaves Dynaquest without a remedy even if it were to obtain a favorable ruling on the additional claims it raises here, we are without authority

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[7] Dynaquest asserts that this court's decision in *Landry v. FDIC*, 204 F.3d 1125 (D.C.Cir.2000), establishes that it is "unnecessary that Dynaquest demonstrate that it was directly harmed by the Postal Service's unconstitutional appointments mechanism" in order to obtain judicial review of an Appointments Clause challenge. Dynaquest Br. at 22. In *Landry*, we entertained such a challenge to the authority of an FDIC Administrative Law Judge (ALJ), even though the FDIC had itself reviewed the ALJ's decision de novo, arguably curing any harm that might have resulted from the alleged unconstitutional appointment. *See* 204 F.3d at 1132. In *Landry*, however, a properly-appointed ALJ would have had authority to decide Landry's case. As noted above, in this case even a properly-appointed AJO would lack authority to collaterally review the Sixth Circuit's decision.

to adjudicate those claims. The district court's dismissal of Dynaquest's complaint is therefore

Affirmed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DYNAQUEST CORP., *et al.*, Plaintiffs,	)	
v.	)	Cv. No. 98-0564 (TFH)
UNITED STATES POSTAL SERVICE, Defendant.	)	

MEMORANDUM OPINION

(Filed Aug. 3, 1999)

The parties come before this Court for a second time in respect to this dispute between Dynaquest, an Ohio Corporation that publishes manuals on "Liquidat[ing] Your Way to a Fortune," and the United States Postal Service. The Postal Service has moved to dismiss or, in the alternative, to transfer the action to the Southern District of Ohio or, in the alternative, to stay this proceeding. Upon consideration of the parties' pleadings and attachments thereto, the Court will grant the Postal Service's motion and dismiss this action with prejudice.

I. BACKGROUND

In 1990, the Postal Service bought an administrative complaint charging that Dynaquest, doing business under the name A.C.L., had "conduct[ed] a scheme or device for obtaining money or property through the mail by means of false representations" in violation of 39 U.S.C. § 3005

(1988). The complaint identified eleven alleged false representations in Dynaquest's mail order program. At the same time, the Postal Service filed an action in the District Court for the Southern District of Ohio seeking a preliminary injunction directing the detention of Dynaquest's mail pursuant to 39 U.S.C. § 3007, pending the resolution of the administrative proceedings.

Following a hearing on the injunction, the parties signed an "Agreed Order" that set forth the framework for detention of Dynaquest's mail. Under the Agreed Order, the Postal Service would return orders and payments for the liquidation program with a "bounce-back" letter explaining that Dynaquest was the subject of a Postal Service investigation for misrepresentations in its mail advertising campaign. Pursuant to the Agreed Order, customers could still purchase Dynaquest products after receiving the bounce-back letters. The payments received for these orders were placed into escrow accounts pending the resolution of the administrative action.

After the administrative hearing, the Associate Judicial Officer ("AJO") found for the Postal Service on four of the charges and issued two orders. *See In re A.C.L.*, P.S. Docket No. 36190 (U.S. Postal Serv. Dec. 28, 1990). The first commanded Dynaquest and its agents to cease and desist from making the representations found false. The second charged the Postmaster at Columbus, Ohio to stop and return any mail addressed to Dynaquest and its agents except mail not related to the fraudulent scheme or mail that requests a refund or return of merchandise. Dynaquest moved for reconsideration, sought to reopen the hearings to introduce the testimony of two supposed

experts in the liquidation business, and requested that the Postal Service release certain funds held in escrow. The AJO denied all the requests. *See In re A.C.L.*, Decision on Motion for Reconsideration, P.S. Docket No. 36190 (U.S. Postal Serv. May 15, 1991).

Dynaquest appealed the administrative decision to this Court. On cross-motions for summary judgment, the Court issued an Order that affirmed the AJO's decision on three of the four representations, vacated the fourth, and sustained the Postal Services' orders. *Dynaquest Corp. v. United States Postal Serv.*, No. 91-582, slip op. at 20 (D.D.C. Mar. 5, 1993). The D.C. Circuit upheld that decision on January 18, 1994. *Dynaquest Corp. v. United States Postal Serv.*, 12 F.3d 1144 (D.C. Cir. 1994).

Upon the termination of Dynaquest's appeal in this Circuit, Dynaquest petitioned the District Court for the Southern District of Ohio for disbursement of the funds in the escrow accounts. Both Dynaquest and the Postal Service moved the court for summary judgment and an award of the escrowed funds. The district court granted summary judgment in favor of the Postal Service, and Dynaquest appealed the decision to the Sixth Circuit Court of Appeals. On appeal, Dynaquest arged that the district court had erred by failing to determine whether the bounce-back letters purged the solicitations of any misrepresentations, thereby removing the solicitations from the scope of the AJO's ruling. The Sixth Circuit affirmed the district court's conclusion that it did not have authority to make such a determination and that it was bound to dispose of the funds in accordance with the final ruling in the administrative proceeding. *See United States Postal Service v. Klass*, 74 F.3d 1241, 1996 WL 20504

(6th Cir. (Ohio)). The court found that, under the statutory framework for detention of mail under 39 U.S.C. § 3007, the district court was precluded from making factual determinations as to whether the statements in the advertisement or the bounce-back solicitation violated the misrepresentation statute. The court noted that Dynaquest's "proper recourse . . . would have been to amend its pleadings in the administrative proceeding for a determination of whether the bounce-back letter cured any prior misrepresentations." *Id.* at **2.

On June 19, 1996, Dynaquest filed a "Motion for Relief from Mail Stop Order; Application to Revoke Mail Stop Order; and for an Order Directing the Release of Escrowed Funds to Applicants and Request for a Hearing" with the Postal Service AJO. Dynaquest argued that it was no longer making any of the representations found false by the Postal Service, that all of the false representations alleged had been cured by the bounce-back letters, and that therefore the escrow funds should be released to Dynaquest. On December 30, 1997, the AJO denied the motion to release the escrowed funds to Dynaquest, but deferred decision on whether to revoke the false representation order. The AJO found that the Ohio District Court and the Sixth Circuit had clearly determined that the escrowed funds should be returned to consumers. The AJO stated:

> [Dynaquest's] current motion is, in effect, a collateral attack on the judgments of [the Southern District of Ohio and the Sixth Circuit] and seeks to have the Judicial Officer direct that the funds held in escrow be paid to [Dynaquest]. The Judicial Officer does not have the authority to do so,

> and will not issue an order directing that the funds be disbursed in any way other then so directed by those courts.

Complaint, Exh. 4, p. 6.

Dynaquest appeals the decision of the AJO to this Court. Dynaquest argues that the AJO improperly ignored the Sixth Circuit's finding that Dynaquest court raise its claim regarding the curative effect of the bounce-back letters at the administrative level. The Postal Service counters that Dynaquest's argument is based on a misreading of the Sixth Circuit decision. The Postal Service contends that although the administrative proceeding is the only proper forum, Dynaquest failed to raise the issue of the bounce-back letters in the 1990 proceeding, and that this action is therefore barred by the doctrine of res judicata. The parties' arguments are considered below.

II. DISCUSSION

A. Standard of Judgment

Under Fed. R. Civ. P. 12, a claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In evaluating plaintiffs' complaints, the Court must accept the factual allegations as true and draw reasonable inferences therefrom in favor of plaintiffs. *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 411 (1986).

B. Res Judicata

The dispute in this case is the correct interpretation of the Sixth Circuit's finding that "[t]he proper recourse for Dynaquest would have been to amend its pleadings in the administrative proceeding for a determination of whether the bounce-back letter cured any prior misrepresentations." *Klass*, 1996 WL 20504 at **2. Dynaquest interprets this as an instruction to return to the administrative level and litigate the bounce-back issue. The Postal Service argues that the Sixth Circuit recognized that Dynaquest could have litigated this issue at the administrative level but did not, and that it is therefore barred by the doctrine of res judicata.

The Court agrees with the Postal Service. The question before the AJO in the 1990 administrative proceeding was whether plaintiffs were operating a false representation scheme through the United States mails in violation of 39 U.S.C. § 3005. That section forbids representations that are false or artfully designed to mislead. *See Dynaquest*, 12 F.3d at 1146 (citing *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948)). Thus, Dynaquest's claim that any false representations in its solicitations were cured by the bounce-back letters was within the purview of the administrative proceeding. Dynaquest's failure to litigate this issue constitutes a waiver of its right to raise it in subsequent proceedings. As the Supreme Court has stated, "[o]rderly procedure and good administration require that objections to the proceedings of as administrative agency be made while it has an opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 (1952); *see also Sprint Communications Co. L.P. v.*

FCC, 76 F.3d 1221, 1228 (D.C. Cir. 1997) (noting that an appellate court's "role is to review the agency's handling of the objections put before it, not to provide a forum for new arguments . . . that the petitioner could have but did not bring out below."). Thus, Dynaquest is procedurally barred from litigating the bounce-back issue, and the Court will dismiss Dynaquest's complaint.

III. CONCLUSION

For the above-stated reasons, the Court finds that Dynaquest's complaint is barred by the doctrine of res judicata. Defendant's motion to dismiss is therefore granted. An appropriate Order will accompany this Memorandum Opinion.

August 2nd, 1999

/s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DYNAQUEST CORP., *et al.*,	)	
Plaintiffs,	)	
v.	)	Cv. No.
UNITED STATES POSTAL SERVICE,	)	98-0564 (TFH)
Defendant.	)	

ORDER

(Filed Aug. 3, 1999)

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that defendant's motion to dismiss is **GRANTED**. This case is therefore **DISMISSED**.

August 2nd, 1999

/s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

[LOGO] *UNITED STATES POSTAL SERVICE*

JUDICIAL OFFICER

WASHINGTON DC 20260-6100
202-268-2134 FAX 202-268-6037

In the Matter of the Complaint Against	)	December 30, 1997
A.C.L.	)	
1470 Clara Avenue	)	
Columbus, OH 43211-2624	)	
and	)	P. S. Docket No. 36/90
626 South High Street	)	
Columbus, OH 43215-5622	)	
and	)	
DYNAQUEST CORP.	)	
M. T. KLASS	)	
1524 Candlewood Drive	)	
Worthington, OH 43235-1624	)	
and	)	
MITCH KLASS	)	
8161 Running Fox	)	
Worthington, OH 43235-4439	)	
	)	

APPEARANCE FOR RESPONDENTS:
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Kravitz & Kravitz
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Columbus, OH 43209-1004

APPEARANCE FOR COMPLAINANT:
Jennifer Y. Angelo, Esq.
Thomas V. Sottile, Esq.
Civil Practice Section
Law Department
United States Postal Service
Washington, DC 20260-1127

POSTAL SERVICE DECISION ON MOTION FOR RELIEF FROM, AND TO REVOKE, MAIL STOP ORDER; AND FOR AN ORDER DIRECTING RELEASE OF ESCROWED FUNDS

Respondents have filed a motion seeking relief from, and the revocation of False Representation Order No. 3074 and seeking an order directing the release of funds currently being held in escrow pursuant to an Agreed Order issued by the United States District Court for the Southern District of Ohio.

BACKGROUND

In June 1990, Complainant filed a complaint with the Judicial Officer alleging that Respondents were mailing advertising materials containing false representations in violation of 39 U.S.C. § 3005 ("the § 3005 proceedings"). At the same time, Complainant initiated parallel proceedings in the United States District Court for the Southern District of Ohio, pursuant to 39 U.S.C. § 3007 ("the § 3007 proceedings"), seeking a temporary restraining order and injunction directing the detention of Respondents' incoming mail by the postmaster, pending resolution of the § 3005 proceedings. After issuance of the temporary restraining order and prior to the hearing on an injunction, the parties negotiated an Agreed Order, which was

issued by the district court, and which, in part, provided that certain actions be taken with respect to mail addressed to A.C.L. in response to solicitations issued by it prior to June 15, 1990. In particular, the Order provided for the use of "bounce-back" letters and provided that payments received from consumers were to be held in an escrow account. The terms of the Order were to remain in effect until "final disposition of the administrative complaint," which was deemed to occur after the conclusion of any appeal by Respondents from the decision of the Judicial Officer.

The Associate Judicial Officer issued a Postal Service Decision (PSD) finding that Respondents had made four representations in their solicitations that were material and false. In connection with the PSD, the Associate Judicial Officer issued False Representation Order No. 3074. Respondents then filed a motion for reconsideration of the Postal Service Decision and for an order releasing the funds held in escrow under the terms of the Agreed Order. The Associate Judicial Officer denied the motion, holding, in part, that the Judicial Officer had no jurisdiction over the funds that were held pursuant to the Agreed Order, since that Order had been issued by the district court, which had jurisdiction over its interpretation and enforcement.

Respondents' appeal from the Postal Service Decision was denied by the United States District Court for the District of Columbia with respect to three of the four representations found material and false by the Associate Judicial Officer. The decision by the district court was upheld on appeal by the Court of Appeals for the District

of Columbia Circuit. No appeal of the latter decision was filed.

Subsequently, in a continuation of the § 3007 proceedings before the United States District Court for the Southern District of Ohio, the court ruled that "final disposition" of the administrative complaint had occurred, as defined under the terms of the Agreed Order, and that funds being held in escrow were to be returned to the consumers who responded to Respondents' solicitation. That ruling was appealed by Respondents to the Court of Appeals for the Sixth Circuit, which affirmed the decision of the district court.

Respondents' Motion

In their current motion, Respondents argue that they are entitled to relief from the False Representation Order under § 60(b)(6) of the Federal Rules of Civil Procedure, which allows a court to relieve a party from a final order, judgment or proceeding. They argue that the False Representation Order only provides for the return of mail, but does not give the postmaster the right to return remittances previously made by those who received the bounce-back letter before doing so. Respondents argue that they have never received a hearing on the merits of their claim that they are entitled to return of the escrowed funds because the bounce-back procedures implemented pursuant to the Agreed Order corrected any misleading information that was ultimately found to exist in Respondents' solicitations.

Respondents also argue that the False Representation Order should be revoked because the reason for the

Order no longer exists. Specifically, Respondents argue that the Postal Service is under a duty to relax or withdraw false representation orders where it is shown that those likely to be deceived by misleading advertising require no further protection. Respondents assert that the offending advertising materials have not been used since the administrative proceeding began in June 1990, and that no orders responding to the solicitation have been received since approximately April 1992. For these reasons, Respondents argue, there is no risk of future harm to the public and, therefore, there is no reason for the False Representation Order to continue in effect.

In reply, Complainant argues that Respondents' effort at this time to raise the issue of the "curative effect" of the bounce-back letters is untimely since the merits of the dispute have long since been decided. Complainant contends that the bounce-back letters were not intended by the parties to have any effect on the merits of the § 3005 proceedings, but were merely an "agreed vehicle sought by Respondents to allow them to continue to do business during the pendency of the administrative case." Complainant argues that, having lost the § 3005 proceeding, Respondents' attempt to use the bounce-back procedure to overturn the result of that proceeding is untimely and frivolous.

As to the revocation of the False Representation Order, Complainant argues that revocation could cause the Agreed Order to be moot, since there would be no "final disposition" of the administrative case for it to relate to and, thus, no mechanism for returning the escrowed funds to consumers.

Decision

The issue of the disposition of the escrowed funds is essentially a question of interpreting the provisions of the Agreed Order that was negotiated by the parties and issued by the United States District Court for the Southern District of Ohio. The district court concluded that Respondents had failed to prevail in the § 3005 proceedings, and that under the terms of the Agreed Order the funds held in escrow were to be returned to the consumers who had ordered Respondents' materials. The Court of Appeals for the Sixth Circuit affirmed the decision of the district court. Although the Sixth Circuit noted that Respondents might have sought to amend their pleadings in the administrative proceeding for a determination of the effect of the bounce back letters on prior misrepresentations, the court concluded that,

> "Furthermore, forwarding the money to Dynaquest would violate the intent of the parties when they entered into the agreement. Statements from the injunction hearing indicate *the parties' understanding that Dynaquest would not receive the funds unless it prevailed on all of the claims of misrepresentation. . . . The record clearly demonstrates Dynaquest's expectation that it would not receive the escrowed funds unless it prevailed.* We agree with the district court's determination that a finding of at least one false misrepresentation makes the Postal Service the prevailing party." (emphasis added).

Therefore, both courts have clearly concluded that Respondents are precluded from receiving the escrowed funds by the terms of the Agreed Order that they entered into. Respondents' current motion is, in effect, a collateral

attack on the judgments of those two courts and seeks to have the Judicial Officer overrule the courts and direct that the funds held in escrow be paid to Respondents. The Judicial Officer does not have the authority to do so, and will not issue an order directing that the funds be disbursed in any way other than as directed by those courts.

With regard to the False Representation Order, the regulation at 39 C.F.R. § 952.29 provides a vehicle through which a party may apply to have such an order modified or revoked. The regulation does not require that a hearing be held or specify conditions under which such an application must be granted. Therefore, the decision whether to hold a hearing and grant an application is left to the discretion of the Judicial Officer. Although the specific concern expressed by Complainant that the Agreed Order would become moot if the False Representation Order were revoked appears unfounded,[1] Respondents have also not shown that they would be prejudiced by the continued existence of that Order for the time necessary to return the escrowed funds, as directed by

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[1] As noted above, the United States District Court for the Southern District of Ohio, in its 1994 Order, specifically found that "final disposition" of the administrative complaint, as contemplated in the Agreed Order, had occurred. Subsequent revocation or modification of the False Representation Order pursuant to 39 C.F.R. § 952.29, based on current conditions, would not represent a decision that the Order was improper when initially issued, and would have no effect on that finding by the District Court for the Southern District of Ohio or on the decisions by the United States District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit in the § 3005 proceedings.

the courts. Moreover, Complainant has indicated that, after return of the escrowed funds, it would be open to reexamining its position with regard to revocation of the False Representation Order. Accordingly, further proceedings relating to a determination on the revocation of the False Representation Order will be deferred until 60 days after the escrowed funds have been returned. At the conclusion of the 60-day period, the parties are to advise whether they have reached agreement on the revocation of the False Representation Order, or whether the matter should be reinstated on the docket for a decision on Respondents' motion.

Respondents' motion for an order directing the release of the escrowed funds is denied. A determination on Respondents' motion for relief from, and revocation of, False Representation Order No. 3074 is deferred as stated herein.

David I. Brochstein
David I. Brochstein
Associate Judicial Officer

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-5326 **September Term, 2000**
98cv00564

Filed On:

Dynaquest Corp, et al, *d/b/a* A.C.L.,

Appellants

v.

United States Postal Service,

Appellee

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

(Filed May 17, 2001)

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
ARTICLE II – THE PRESIDENT

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Current through P.L. 107-11, approved 5-28-01

Section 2, Clause 2. Treaty Making Power; Appointing Power

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S.C.A. Const. Art. III § 2, cl. 2

USCA CONST Art. II § 2, cl. 2

39 USCA s 3005
39 U.S.C.A. § 3005

UNITED STATES CODE ANNOTATED
TITLE 39. POSTAL SERVICE
PART IV – MAIL MATTER
CHAPTER 30 – NONMAILABLE MATTER

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Current through P.L. 106-170, approved 12-17-99

§ 3005. False representations; lotteries

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d), (h), (i), (j), or (k) of this title, or is engaged in conducting a lottery, gift enterprise, or scheme for the distribution of money or of real or personal property, by lottery, chance, or drawing of any kind, the Postal Service may issue an order which –

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender;

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the

return to the remitter of the sum named in the money order or postal note; and

(3) requires the person or his representative to cease and desist from engaging in any such scheme, device, lottery, or gift enterprise.

For purposes of the preceding sentence, the mailing of matter which is nonmailable under such section 3001(d), (h), (i), (j), or (k) by any person shall constitute prima facie evidence that such person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations.

(b) The public advertisement by a person engaged in activities covered by subsection (a) of this section, that remittances may be made by mail to a person named in the advertisement, is prima facie evidence that the latter is the agent or representative of the advertiser for the receipt of remittances on behalf of the advertiser. The Postal Service may ascertain the existence of the agency in any other legal way satisfactory to it.

(c) As used in this section, the term "representative" includes an agent or representative acting as an individual or as a firm, bank, corporation, or association of any kind.

(d) Nothing in this section shall prohibit the mailing of (1) publications containing advertisements, lists of prizes, or information concerning a lottery, which are exempt, pursuant to section 1307 of title 18 of the United States Code, from the provisions of sections 1301, 1302, 1303, and 1304 of title 18 of the United States Code, (2) tickets or other materials concerning such a lottery within

that State to addresses within that State, or (3) an advertisement promoting the sale of a book or other publication, or a solicitation to purchase, or a purchase order for any such publication, if (a) such advertisement, solicitation, or purchase order is not materially false or misleading in its description of the publication; (B) such advertisement, solicitation, or purchase order contains no material misrepresentation of fact: Provided, however, That no statement quoted or derived from the publication shall constitute a misrepresentation of fact as long as such statement complies with the requirements of subparagraphs (A) and (C); and (C) the advertisement, solicitation, or purchase order accurately discloses the source of any statements quoted or derived from the publication. Paragraph (3) shall not be applicable to any publication, advertisement, solicitation, or purchase order which is used to sell some other product in which the publisher or author has a financial interest as part of a commercial scheme. For the purposes of this subsection, "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(e)(1) In conducting an investigation to determine if a person is engaged in any of the activities covered by subsection (a) of this section, the Postmaster General (or any duly authorized agent of the Postmaster General) may tender, at any reasonable time and by any reasonable means, the price advertised or otherwise requested for any article or service that such person has offered to provide through the mails.

(2) A failure to provide the article or service offered after the Postmaster General or his agent has tendered

the price advertised or otherwise requested in the manner described in paragraph (1) of this subsection, and any reasons for such failure, may be considered in a proceeding held under section 3007 of this title to determine if there is probable cause to believe that a violation of this section has occurred.

(3) The Postmaster General shall prescribe regulations under which any individual seeking to make a purchase on behalf of the Postal Service under this subsection from any person shall –

(A) identify himself as an employee or authorized agent of the Postal Service, as the case may be;

(B) state the nature of the conduct under investigation; and

(C) inform such person that the failure to complete the transaction may be considered in a proceeding under section 3007 of this title to determine probable cause, in accordance with paragraph (2) of this subsection.

CODE OF FEDERAL REGULATIONS
TITLE 39 – POSTAL SERVICE
CHAPTER I – UNITED STATES POSTAL SERVICE
SUBCHAPTER N – PROCEDURES
RULES OF PROCEDURE BEFORE
THE JUDICIAL OFFICER
PART 952 – RULES OF PRACTICE
IN PROCEEDINGS RELATIVE TO FALSE
REPRESENTATION
AND LOTTERY ORDERS

Current through April 1, 2000; 65 FR 17413

§ 952.29 Modification or revocation of orders.

A party against whom an order or orders have been issued may file an application for modification or revocation thereof. The Recorder shall transmit a copy of the application to the General Counsel, who shall file a written reply within 10 days after filing or such other period as the Judicial Officer may fix. A copy of the reply shall be sent to the applicant by the Recorder. Thereafter an order granting or denying such application will be issued by the Judicial Officer.